

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL REVISION APPLICATION NO.89 OF 1998**

Union of India
through A.K.Singh
Asstt.Commissioner of
Income Tax,
Circle 22(2),
Piramal Chambers, 6th floor,
Parel, Mumbai-400 012

...Applicant.
(Ori.Complainant)

V/s.

Madan Mohan C. Gandhi
492/8, New Mani Bhavan,
Prarthana Samaj Road,
Vile Parle (West),
Mumbai- 400 056

...Respondent.
(Ori.Accused)

Shri H.V.Mehta, Public Prosecutor for the Applicant.

Shri K.B.Bhujale and Shri S.A.Tambe, advocates for the Respondent.

**CORAM: J.H.BHATIA, J.
DATE : 26th February, 2007.**

ORAL JUDGMENT:

1. This revision application is directed against the order dated 14th September, 1997 passed by the Additional Chief Metropolitan Magistrate 47th Court Esplanade Bombay discharging the respondent from the offence punishable under Section 276(c) and 277 of the Income Tax Act.

2. To state in brief the revenue had filed a

complaint registered as criminal case no.214/S/92 against the respondent contending that he had filed returns of income for the assessment year 1987-88 wherein he had wrongly shown certain expenses and receipts and thereby he had suppressed the income to the tune of Rs.5,68,690. The assessing officer after scrutiny of the returns made addition to that extent and imposed penalty. It was found that he had wrongly shown hire charges to the tune of Rs.60,000/- and technical fee of Rs.45,190/- which was allegedly paid to his son. He had also shown loan of Rs.1,30,000/- from his son and repayment of loan of Rs.1,55,000/- from his wife. He had also claimed that he had also taken loan of Rs.75,000/- from his wife and had also received amount of Rs.1,04,500/- by sale of gold ornaments. The total of these items would be Rs.5,69,690/-. According to the revenue, the whole of this amount was the income of the respondent which he had tried to conceal for evading the income tax on the same. After obtaining necessary sanction from the Commissioner of Income Tax, the complaint was filed.

3. On behalf of the revenue, two witnesses were examined before framing of charge. Some documents were also placed on record. On behalf of the respondent, it was contended that before according sanction for

prosecution, the Commissioner had not issued any show-cause notice to the respondent and he was deprived of right to get the matter compounded and, therefore, sanction itself was bad in law. Further it was contended that there is also difference in the actual amount of income, which was allegedly concealed and the amount of concealment shown in the sanction order and it indicated that the sanctioning authority had not applied its mind and had mechanically accorded the sanction. It was also contended that wife of the respondent had already disclosed her income for the years 1981-82 to 1987-88 under the 'Amnesty Scheme' and the respondent had received back an amount of Rs.1,55,000/- from his wife towards the loan which was earlier advanced to her. Besides, this the wife also advanced an amount of Rs.75,000/- to him as fresh loan. For this there was sufficient amount in her account as disclosed under the 'Amnesty Scheme'. He also alleges that he had actually sold gold ornaments for Rs.1,04,500/- and thus, it was addition to the capital. He had taken a loan of Rs.1,30,000/- from his son, for which he had sufficient amount in his account. He also contended that as hire charges paid by him to workers and the amount of Rs.45,190/- was paid to his son as technical fee. These expenses were shown in the accounts and there was no reason to disbelieve the same. He also contended that

the additions made by the assessing officer were deleted by the Appellate Tribunal and, therefore, for the said amounts, he could not be prosecuted before a criminal Court.

4. After hearing the arguments, the learned Additional Chief Metropolitan Magistrate upheld the contentions raised by the respondent and passed the impugned order discharging the respondent.

5. With the help of the learned counsel for both sides, I have carefully perused the record. The record reveals that total of the amount which was allegedly concealed by the respondent was as follows:

1.	Hire Charges	Rs.60,000/-
2.	Technical fee paid to the son	Rs.45,190/-
3.	Loan taken from son	Rs.1,30,000/-
4.	Repayment of loan by the wife.	Rs.1,55,000/-
5.	Loan taken from wife	Rs.75,000/-
6.	Sale proceeds of the Gold ornaments	Rs.1,04,500/-
Total		Rs.5,69,690/-

The Commissioner of Income-tax, who accorded the sanction, has shown this amount as Rs.5,68,690/-. It shows that in the place of figure '9', figure '8' was wrongly typed. Merely because of slight typographical mistake, it can not be held that the Commissioner of Income-tax had not applied his mind and had mechanically accorded the sanction. The learned Additional Chief Metropolitan Magistrate came to a conclusion that a total amount of income which was allegedly concealed was Rs.5,33,460/-. Infact, that statement is not correct.

6. The learned Additional Chief Metropolitan Magistrate relying on certain authorities from Bombay, Calcutta and Rajasthan High Court came to a conclusion that show-cause notice under Section 279(2) of the Income Tax Act is necessary before according sanction to the prosecution or before launching the prosecution. Admittedly, no such show-cause notice was issued to the respondent and therefore, the learned Chief Metropolitan Magistrate held that the prosecution was bad in law for want of a mandatory show-cause notice. However, it may be pointed out that in **Union of India v. Banwari Lal Agarwal AIR 1999 Supreme Court 196**, the Supreme Court has clearly held that a prior notice or opportunity of hearing is not necessary as it is only enabling

provision, which enables the Chief Commissioner or Director General to compound any offence. In paragraph 7, the Supreme Court observed as follows:

" 7. We further find that sub-section (2) of Section 279 is a provision which enables the Chief Commissioner or the Director General to compound any offence either before or after the institution of proceeding. There is no warrant in interpreting this sub-section to mean that before any prosecution is launched either a show cause notice should be given or an opportunity afforded to compound the matter. The enabling provision cannot give a right to a party to insist on the Chief Commissioner or the Director General to make an offer of compounding before the prosecution is launched."

In view of this, it is clear that the show-cause notice is not necessary to be issued before according sanction for prosecution or before launching a prosecution. It may be noted that the judgment of the Supreme Court in Banwari Lal came after the impugned order was passed by the learned Additional Chief Metropolitan Magistrate and, therefore, he did not have a benefit of the said Supreme Court judgment. Any how legal position is now settled. It is clear that merely because notice under Section 279(2) was not issued to the respondent before according sanction or before launching a prosecution, the prosecution does not become bad.

7. It may be noted that against the additions made by the assessing officer, respondent had preferred an appeal before the Commissioner of Income Tax (Appeals). That appeal was dismissed. Thereafter, he preferred appeal before Income Tax Appellate Tribunal in I.T.A.No.3985/Bom/1991. The appellate tribunal allowed the appeal to the extent of following 4 items.

1.	Hire charges	Rs.60,000/-
2.	Technical Fee	Rs.45,190/-
3.	Loan from son	Rs.1,30,000/-
4.	Repayment of loan by wife	Rs.1,55,000/-

The tribunal was satisfied with the explanation given by the respondent and held that the addition made by the assessing officer on these four counts was not justified. As such these additions came to be deleted. The judgment of the appellate tribunal in this respect has become final and the revenue is bound by the same. In **G.L.Didwania v. Income-Tax Officer And Another 1997 Income Tax Reports (Volume 224) Page 687**, the Supreme Court clearly held that where the finding of the assessing authority that the assessee had made a false statement in respect of certain income was set aside by the Appellate Tribunal, the criminal proceeding on the same allegation could no longer be sustained. Relying

on G.L.Didwania, the Supreme Court in **K.C.Builders And Another v. Assistant Commissioner of Income-Tax (2004 Income Tax Reports Volume 265 Page 562)** again held that if the tribunal had set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, prosecution can not be proceeded with by the complainant and further criminal proceeding will be illegal and without jurisdiction.

8. Mr.Mehta, the learned counsel for the Revenue vehemently contended that adjudication by the revenue authority and the prosecution can be taken up simultaneously. There is no dispute about this legal proposition but in view of the law laid down by the Supreme Court, if the appellate tribunal, while adjudicating the alleged concealment and penalty, has set aside the findings of the assessing authority, no basis remains for the criminal prosecution of the assessee. In view of this after the appellate tribunal had set aside the additions made by the assessing authority on the above referred four counts, the prosecution could not be continued for alleged concealment of income covered by these four counts. To that extent the order of discharge is correct.

9. The appellate tribunal had not allowed the

appeal of the respondent about following two items:-

1. Sale proceeds of gold ornaments Rs.1,04,500/-
2. Loan taken from wife Rs.70,000/-

It may be noted that at some places loan taken from wife is shown as Rs.75,000/- and at some places, it is Rs.70,000/-. This difference is not so serious. It appears that at some places there are typographical mistakes about the exact amounts. The appellate tribunal has shown this amount as Rs.1,74,000/- while infact it would be Rs.1,74,500/- or Rs.1,79,500/-. This is subject to verification of the record. The appellate tribunal agreed with the observations made by the Commissioner of Income-Tax (A) to the extent of these amounts. The appellate tribunal observed as follows:

"4. The assessing officer had made an addition of Rs.1,74,000 for the purchase of which no corresponding income was declared under the Amnesty Scheme and on account of absence of proof of sale of gold ornaments. He had not added the entire amount alleged to have been received from the wife. No proof regarding the sale of gold ornaments was filed even before us. In these circumstances, we uphold the addition of Rs.1,74,000/-."

Thus, it is clear that the appellate tribunal upheld the

addition of Rs.1,74,000/- on account of sale proceeds of the gold ornaments and loan taken from wife and the appeal against that addition was rejected. This is the amount which was allegedly concealed and thereby the respondent had tried to evade the income tax. Therefore, he should be liable to be prosecuted under Section 276(c) and 277 of the Income Tax Act. Discharge of the respondent to this extent can not be supported.

10. For the aforesaid reasons, revision application is partly allowed and the criminal case no.214/S/92 is hereby restored to the file of Additional Chief Metropolitan Magistrate with a direction to proceed with the framing of charge and trial as per the law to the extent of sale proceeds of the gold ornaments Rs.1,04,500/- and loan taken from wife (Rs.70,000/- or Rs.75,000 subject to verification from the record). Order of discharge to the extent of remaining items is upheld. The respondent shall appear before the learned Additional Chief Metropolitan Magistrate on 28th March, 2007.

11. The learned counsel for the respondent makes a statement that the respondent shall approach competent authority under the Income-Tax Act for compounding the offence. If such request is made by the respondent, the

competent authority may take decision on its own merits, within two months from the date of fresh application and if such application is made by the respondent to the competent authority, the learned Additional Chief Metropolitan Magistrate shall give reasonable time and opportunity for passing an order on such application.

(J.H.Bhatia,J.)